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Supreme Court of the United States

OCTOBER TERM, 1948

No. 622

A/S J. LUDWIG MOWINCKELS REDERI *et al.*
Defendants-Appellants

against

ISBRANDTSEN CO., INC.
Plaintiff-Appellee

APPLICATION TO TRANSFER TO SUMMARY DOCKET

BRIEF IN SUPPORT OF SAID APPLICATION, AND IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

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Dated: March 15, 1949.

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No. 622

A/S J. LUDWIG MOWINCKELS REDERI
et al.
Defendants-Appellants

against

ISBRANDTSEN CO., INC.
Plaintiff-Appellee

APPLICATION TO TRANSFER TO SUMMARY DOCKET

Come now the appellants and hereby apply under Paragraph 5 of Rule 7 for transfer of this case to the Summary Docket, on the ground that the case is of such a character as not to justify extended argument.

Appellants annex hereto in support of their application their brief of this date pursuant to Rule 7 in opposition to appellee's Motion to Affirm.

Respectfully submitted,

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BURTON H. WHITE
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New York City

Dated: March 15, 1949.

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No. 622

A/S J. LUDWIG MOWINCKELS REDERI
et al.
Defendants-Appellants

against

ISBRANDTSEN CO., INC.
Plaintiff-Appellee

BRIEF FOR APPELLANTS IN SUPPORT OF TRANSFER TO SUMMARY DOCKET, AND IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

On February 25, 1949 there was served on us by counsel for Isbrandtsen Co., Inc., appellee herein, a typewritten copy of a "Motion to Affirm", entitled in the United States District Court, Southern District of New York, moving this Court to affirm the judgment of the District Court [granting injunction] on the ground that no substantial purpose could be served by further argument in this cause, and stating certain contentions.

Said motion and the grounds stated therefor indicate a fairly complete misapprehension by appellee of the single simple issue on this appeal—vacation of the injunction—as set forth in the Jurisdictional Statement which is part of the record filed in this Court February 28, 1949. The December 20, 1948, opinion of the three judges of the District Court was published February 21, 1949, 81 F. Supp. 544.

I

Rate making functions and related facts are involved, not merely a law question.

Appellants seek reversal of that part of the District Court's order of January 13, 1949 which granted a temporary injunction against them in respect of their *rate methods* and "contract rate practice" in trans-Atlantic trades. Appellee had contended that the same would be competitively prejudicial to it. The District Court granted the injunction notwithstanding that by its opinion and order the Court recognized, and indeed made it a condition, that administrative procedure before the United States Maritime Commission must be invoked and exhausted before any determination on the merits could be made by a Court.

The Maritime Commission under date of March 8, 1949 denied a "Motion for Expedited Procedure" made by Appellee in the proceeding [U. S. M. C. Docket 684], instituted before it by appellee pursuant to the District Court's said condition. The Commission's denial order shows that important questions of fact, as well as of law, are involved in said proceeding, in which appellants have duly filed answer. A true copy of the Commission's said order as served on us March 9, 1949 is annexed hereto (p. 14).

Appellee contended before the District Court, likewise before the Maritime Commission, that the subject matter is a mere question of law concerning alleged lack of power in the Commission to have approved certain Conference agreements under Sec. 15 of the Shipping Act, 1916, (46 U. S. C. Sec. 814) in so far as they contained what (according to appellee's contention) purported to be authority for the contract rate practice.

The District Court referred to *Swayne & Hoyt Ltd. et al.* v. *United States*, 300 U. S. 297, also to the legislative history of the statute, as throwing "very considerable doubt upon such a holding" [i. e. lack of Commission au-

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thority to approve]; saying "we need not decide that question now". The Court concluded on this point by saying: "We should not at this stage pass on the validity of the agreements before the Commission, in accordance with its established procedure, has had an opportunity to pass thereon in an adversary proceeding". Thus the Court left the matter open on questions both of law and of fact under the several regulatory provisions of the Shipping Act, 1916, as amended (46 U. S. C. sec. 801, *et seq.*). This disposition conforms to the March 8, 1949 order of the Commission just above referred to.

II

There was no "order" before the District Court for its review.

We emphasize that the District Court did not have before it for review or other action any "order" of the Commission, or anything assimilable thereto. See *United States* v. *Los Angeles R. R.*, 273 U. S. 299; *C. and S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103.

An example of the Conference Agreement provisions in controversy is one from Paragraph (3) in "North Atlantic Continental Freight Conference Agreement as approved August 24, 1935 (Ex. A to Complaint), reading as follows:

> "The Conference may provide specific contract and non-contract rates in an effort to stabilize rates and permit of forward trading for the common good of the Members and Exporters and the permanent Chairman and/or Secretary is hereby empowered to negotiate and execute such contracts as may be authorized by the Conference."

Although appellee's contentions purport to be based chiefly on other more recent documents, the same in substance or in practice refer back directly or indirectly to the

foregoing, as concerns Eastbound traffic. The Westbound provisions are less definite.

The contract-non-contract system is an ocean freight rate practice subject to regulation by the Commission under pertinent provisions of the Shipping Act. The validity of the practice in this, that, or the other situation is not dependent upon advance approval by the Commission under Section 15 of that Act, although the validity of Conference agreements between ocean carriers is so subject in relation to exemption from prohibitions of the anti-trust laws. It would indeed be hardly possible for the Commission to approve in advance any contract rate practice as correct in every situation whatever. That question necessarily depends on the facts and circumstances of the particular case as the same shall be developed before the Commission, where shippers and carriers may present their views and arguments for consideration. The Commission is thus enabled to appraise and decide what is right and just not only for private interests but also as concerns the commerce of the United States in respect of the freight rate practice, activity or commercial proposition under attack or in issue before it. This has been indicated by the Commission in many cases, one of the later instances of which is *Pacific Coast European Conference Agreement,* U. S. M. C. Docket 648, decided January 12, 1948, 3 U. S. M. C. 11, wherein a fairly complete discussion with resultant determination on the "Contract Rate System" appears at pp. 14-19.

The *Swayne & Hoyt* case above referred to developed from the decision of United States Shipping Board Bureau in its Docket 294, *Gulf Intercoastal Contract Rates,* 1 U. S. M. C. 524, wherein the Secretary of Commerce reviewed the contract rate subject-matter and stated, p. 530: "Whether any such system is lawful is a question which must be determined by the facts in each case."

Both of these regulatory decisions on "contract rates" were cited to the District Court. Its opinion (81 F. Supp. at 546) refers to the footnote at 300 U. S. 307. Mr. Justice

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Stone at that page, notwithstanding affirmance, intimated a difference of opinion as to the correctness of the Secretary's determination against contract rates in the intercoastal trade. This circumstance adds emphasis to the exclusive nature of the Commission's jurisdiction.

III

Granting the injunction constituted prejudgment by the District Court.

The District Court's action in granting an injunction under the circumstances would thus appear to constitute a prejudgment on matters not within its province or jurisdiction. Not until after final action by the Commission has any District Court any jurisdiction in such matters, and then it is prescribed by Sec. 29 of the Shipping Act, 1916 (46 U. S. C. Sec. 828). The injunction order as entered interferes on its face with the broad powers granted to the Commission under said 1916 Act. Such unlawful exercise of jurisdiction by the Court is substantially an admonition to the Commission as to how it shall decide its Docket 684. This jurisdictional deviation prejudices the Commission in the free performance of its functions, and the rights and interests of appellants and appellee herein; also those of other carriers, likewise shippers, in the foreign commerce of the United States.

Thus the temporary injunction is not in aid of the administrative process but tends to impair the same.

The Commission intervened in the proceedings before the District Court, and vigorously opposed issuance of the injunction.

IV

There was no irreparable damage.

Further, the record is devoid of the slightest evidence or even probable indication that appellee had suffered or would suffer "irreparable damage" from appellants' contract rate practice. That practice was well known and not in any sense forbidden, but approved rather, when the H. R. Report on Shipping Affairs was issued in 1914 (H. R. Doc. 805, 63rd Congress, 2nd Sess. 1914).

Even had the District Court had any jurisdiction in the premises, it was thus forbidden to grant an injunction for lack of the inevitable condition, "irreparable damage". The Court contented itself with merely asserting that appellee "would be gravely prejudiced".

Since appellee contends that the Commission had no lawful power under Section 15 of the Shipping Act (46 U. S. C. Sec. 814) to approve the provisions of the Conference agreements in respect of contract rates, it might follow that appellee would, *on such an assumption*, be entitled to institute suit for triple damages under the Sherman Act (15 U. S. C. Sec. 15). That appellee has not taken or intimated taking any such step would suggest either that it has suffered no damages or that it has declined to avail itself of an open legal remedy. In either case no right to sue in equity for an injunction could exist. *Lawrence* v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588.

V

The District Court had no jurisdiction. The jurisdiction is solely that of the Maritime Commission.

The point presented by appellants to this Court is that the order for injunction should be reversed on the ground that the District Court had no jurisdiction or power.

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We do not here ask the Court to consider the merits of the contract rate matter in any respect whatsoever, regarding that as having been committed by law solely to the administrative action and decision of the Maritime Commission.

The present case is not different from that which was before this Court in *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 which came here also from the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit. The plaintiff carrier there sought an injunction against certain acts by other carriers upon the ground that the same violated the Shipping Act, 1916. This Court took the firm position that the question whether such acts violated the Shipping Act called for exercise of the primary exclusive jurisdiction of the regulatory agency to be exercised and exhausted before the Court could issue even a preliminary injunction. The District Court's issuance here of a preliminary injunction in advance of the prescribed specialized regulatory steps flies in the face of the *Cunard* decision. The District Court's action was not merely an abuse of discretion but was an infringement on and usurpation of the exclusive jurisdiction of the Maritime Commission.

That no injunction, either temporary or permanent, should issue where there has been a failure to exhaust a specific administrative remedy, is amply demonstrated by many decisions of this Court. *Aircraft & Diesel Equipment Corp.* v. *Hirsch, et al.*, 331 U. S. 752; *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540; *Myers, et al.* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Board* v. *Great Northern Ry.*, 281 U. S. 412.

See also *Wickwire Steel Co.* v. *New York Cent. & H. R. R. Co.*, 181 Fed. 316 (2d C. C. A. 1910); *Columbus Iron & Steel Co.* v. *Kanawha & M. Ry. Co.*, 178 Fed. 261 (4th C. C. A. 1910); *Atlantic Coast Line R. Co.* v. *Macon Grocery Co.*, 166 Fed. 206 (5th C. C. A. 1909) aff'd. 215 U. S. 501.

The *Great Northern* decision, relating to the Interstate Commerce Commission, appears to have settled beyond cavil the law as we state it and to make academic any further consideration of the point. Mr. Chief Justice Hughes there said, 281 U. S. at 429:

> "When * * * the question arose as to the propriety of judicial action in granting injunctions * * * pending the decision of the Interstate Commerce Commission whether such rates were unreasonable or unjustly discriminatory, there was a conflict of opinion in the lower Federal courts, but the weight of decision was that such relief, although temporary in character, could not be granted prior to an appropriate finding by the Interstate Commerce Commission, and this ruling accorded with the principle declared by this Court in the *Abilene* and other cases, *supra*."

At page 430 Chief Justice Hughes stated clearly the principles which forbid injunction in such case and then concluded:

> "It is urged that the restraining power of the Court is needed to prevent irreparable injury. But, in this class of cases, the questions whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission."

The conclusiveness of the prohibition is the more certain (if possible) in the case at bar in view of the remarks of Mr. Justice Sutherland in *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, at 485-86:

> "The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion. Indeed, if there be a difference, the conclusion as to the first named act rests upon stronger ground, since the decisions of

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this court compelling a preliminary resort to the commission were made in the face of a clause in § 22 of the Interstate Commerce Act, that nothing therein contained should in any way abridge or alter existing common law or statutory remedies, but that the provisions of the act were in addition to such remedies (*Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 256); a clause that finds no counterpart in the Shipping Act."

VI

The cases cited by appellee do not support its motion to affirm.

The cases cited by appellee do not in the slightest degree sustain its motion to affirm. We now refer to said cases briefly:

General American Tank Car Corp. v. *El Dorado T. Co.*, 308 U. S. 422, involved no injunction but merely an action in assumpsit. This court held that the suit should not have been dismissed but held in abeyance until determination of the administrative proceeding. The point in that case is not present here. There is no appeal here from denial by the District Court of the November 18, 1948 motion to dismiss—patterned on that in the *Cunard* case. Granting of the relief now sought by appellants would not by itself result in dismissal of the District Court action. *El Dorado Oil Works* v. *U. S.*, 328 U. S. 12, merely reflects a later aspect of that case, and does not bear on any issue here.

Columbia Broadcasting System, Inc. v. *U. S.*, 316 U. S. 407, supports appellee's statement that a suit to review an order of the Federal Communications Commission is in equity. That is not contested, nor is it material. That case made a specific finding of "irreparable damage" not present here—notwithstanding that appellee's motion represents "irreparable damage" in several places. The

District Judges only said "gravely prejudiced", without specification or explanation.

In the *per curiam* decision in *Ohio Oil Co.* v. *Conway*, 279 U. S. 813, there was a clear case of irreparable damage which would surely result from the enforcement of the tax statute claimed to be unconstitutional, inasmuch as the State statutes provided no remedy whereby restitution of taxes paid could be enforced. The court properly found that apart from injunctive relief "the plaintiff will be remediless".

Alabama v. *U. S.*, 279 U. S. 229, was a suit to set aside an Interstate Commerce Commission order, which established intrastate rates on fertilizers, etc. "and was made after a full inquiry" (p. 230). The District Court had denied application for a preliminary injunction pending final hearing in that Court, and this Court affirmed the decree. The difference between that case and ours is so apparent as hardly to require special comment. There, the Interstate Commerce Commission had made full inquiry, and made its determination by an "order"—notwithstanding which the Court refused an injunction. Here, the matter in complaint had not even been submitted to the Maritime Commission so that no "inquiry" by it of any kind could be made, much less any "order" subject to court review. Even had there been any jurisdictional basis for the injunction issued in the case at bar, the propriety of issuance by the District Court would have been exceedingly doubtful, in view of the general public interest in the commercial subject-matter, affecting the rights of shippers to contract, as well as carriers. See *Yakus* v. *U. S.*, 321 U. S. 414, 440.

The hollowness of appellee's contentions is attested by the very cases it relies on. In sum they emphasize at least three necessary prior conditions of an injunction, which appellee's case at bar so conspicuously lacks: (1) investigation and hearing by the Commission; (2) resulting determination by the Commission in the form of an order; (3) clear showing of specified irreparable damage.

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Conclusion

We conclude that the propositions raised by appellee on its "Motion to Affirm" are so unsubstantial as not to justify extended argument; and that the clarity of the appellants' right to have the injunction dissolved is such that extended argument ought not to be necessary in support of the same.

Believing that the matter is of the character that might well be transferred to the summary docket in the interest of expedition, we have prefixed to this brief a formal application to this effect.

Respectfully submitted,

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27 William Street
New York City

Dated: March 15, 1949.

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ORDER

At a Session of the UNITED STATES MARITIME COMMISSION, held at its office in Washington, D. C., on the 8th day of March A. D., 1949

SERVED
MAR 9 1949
U. S. MARITIME COMMISSION

NO. 684

ISBRANDTSEN COMPANY, INC.

v.

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, ET AL.

Complainant having filed Motion for Expedited Procedure, moving that the full Commission rather than one or more examiners preside at the hearing herein, to hear arguments and to receive briefs on the issue of law involved; and respondents having filed a reply thereto; and due consideration having been given; and it appearing that important questions of fact as well as of law are involved in this proceeding;

It is ordered, That the motion be, and it is hereby, denied; and

It is further ordered, That the hearings herein be conducted by the Commission's Office of Trial Examiners in accordance with the applicable rules of procedure.

By the Commission

(SEAL)

/s/ R. L. McDonald
Asst. Secretary